



**CUI//SP-MIL/SP-PRVCY**

**UNITED STATES AIR FORCE  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2021-03464

*Work-Product*

**COUNSEL:** NONE

**HEARING REQUESTED:** NO

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**APPLICANT'S REQUEST**

His bad conduct discharge (BCD) be upgraded to a general (under honorable conditions) discharge.

**APPLICANT'S CONTENTIONS**

He has been an upstanding citizen since his discharge and has kept his records clean. His last year and a half on active duty he was diagnosed with Post-Traumatic Stress Disorder (PTSD). As a result of an asthma diagnosis, he was placed on the temporary disability retired list (TDRL). He got in trouble for marijuana which terminated the TDRL and resulted in a court-martial, confinement and a BCD. In 2017, he was diagnosed with cancer and is now cancer free. He is married, started a family, maintained employment, and enrolled in massage therapy school. He would like to qualify for Department of Veterans Affairs (DVA) benefits to help him with schooling and health.

The applicant's complete submission is at Exhibit A.

**STATEMENT OF FACTS**

The applicant is a former Air Force airman basic (E-1).

On 13 Aug 07, the applicant's primary care manager (PCM) recommended he meet a medical evaluation board (MEB).

On 23 Aug 07, AF IMT 618, *Medical Board Report* indicates the applicant was referred to the Informal Physical Evaluation Board (IPEB) for moderate persistent asthma.

On 27 Sep 07, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to his medical condition of asthma with a 30 percent disability rating.

On 12 Oct 07, Special Order No. *Work-Product*, indicates the applicant was relieved from active duty effective 11 Dec 07 and placed on the TDRL with a 30 percent disability effective 12 Dec 07.

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According to the applicant's initial DD Form 214 for the period of 3 Sep 02 to 11 Dec 07, he retired with a narrative reason for separation of "Disability, Temporary" after serving five years, three months and nine days of active duty.

On 8 Jul 08, Special Order No. [Work-Product], indicates the applicant's TDRL was revoked.

According to CMS 2098, *Duty Status Change*, effective 17 Oct 08, the applicant was placed in pre-trial confinement.

On 7 Jan 09, the convening authority published General Court-Martial Order Number [Alto...]. The Order indicates the applicant pled guilty to one charge and one specification of conspiring to distribute marijuana (Article 81). The applicant also pled guilty to one charge and five specifications of wrongful distribution of marijuana (Article 112a). The applicant was sentenced to confinement for one year and one month, reduction to the grade of airman basic (E-1) and discharge from the service with a BCD.

According to CMS 2098, effective 15 May 09, the applicant was placed on parole.

On 11 Jan 10, according to General Court-Martial Order Number [Alto...], the sentence to confinement for one year and one month, reduction to the grade of airman basic (E-1) and discharge from the service with a BCD was affirmed.

On 19 Jan 10, the applicant received a bad conduct discharge. His narrative reason for separation is "Court-Martial (Other)." He was credited with five years, nine months, and four days of total active service.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit C.

**POST-SERVICE INFORMATION**

On 15 Jun 22, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation (FBI); however, he has not replied.

**APPLICABLE AUTHORITY**

This Board is without authority to reverse, set aside, or otherwise expunge a court-martial conviction. Rather, in accordance with Title 10, United States Code, Section 1552(f), actions by this Board are limited to corrections reflecting actions taken by the reviewing officials and action on the sentence of the court-martial for the purpose of clemency.

On 3 Sep 14, the Secretary of Defense issued a memorandum providing guidance to the Military Department Boards for Correction of Military/Naval Records as they carefully consider each petition regarding discharge upgrade requests by veterans claiming PTSD. In addition, time limits to reconsider decisions will be liberally waived for applications covered by this guidance.

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On 25 Aug 17, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued clarifying guidance to Discharge Review Boards and Boards for Correction of Military/Naval Records considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions [PTSD, Traumatic Brain Injury (TBI), sexual assault, or sexual harassment]. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on the aforementioned conditions.

Under Consideration of Mitigating Factors, it is noted that PTSD is not a likely cause of premeditated misconduct. Correction Boards will exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with the aforementioned mental health conditions and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

Boards are directed to consider the following main questions when assessing requests due to mental health conditions including PTSD, TBI, sexual assault, or sexual harassment:

- a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
- b. Did that condition exist/experience occur during military service?
- c. Does that condition or experience actually excuse or mitigate the discharge?
- d. Does that condition or experience outweigh the discharge?

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued supplemental guidance to military corrections boards in determining whether relief is warranted based on equity, injustice, or clemency. These standards authorize the board to grant relief in order to ensure fundamental fairness. Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority Boards have to ensure fundamental fairness. This guidance applies to more than clemency from sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. Each case will be assessed on its own merits. The relative weight of each principle and whether the principle supports relief in a particular case, are within the sound discretion of each Board. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, the Board should refer to the supplemental guidance, paragraphs 6 and 7.

On 15 Jun 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit E).

AFI 36-3208, *Administrative Separation of Airmen*, describes the types of service characterization:

**Honorable.** The quality of the airman's service generally has met Air Force standards of acceptable conduct and performance of duty or when a member's service is otherwise so meritorious that any other characterization would be inappropriate.

**Under Honorable Conditions (General).** If an airman's service has been honest and faithful, this characterization is warranted when significant negative aspects of the airman's conduct or performance of duty outweigh positive aspects of the airman's military record.

**Under Other than Honorable Conditions.** When basing the reason for separation on a pattern of behavior or one or more acts or omissions that constitute a significant departure from the conduct

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expected of airmen. The member must have an opportunity for a hearing by an administrative discharge board or request discharge in lieu of trial by court-martial. Examples of such behavior, acts, or omissions include, but are not limited to:

- The use of force or violence to produce serious bodily injury or death.
- Abuse of a special position of trust.
- Disregard by a superior of customary superior - subordinate relationships.
- Acts or omissions that endanger the security of the United States.
- Acts or omissions that endanger the health and welfare of other members of the Air Force.
- Deliberate acts or omissions that seriously endanger the health and safety of other persons.
- Rape, sexual assault, aggravated sexual contact, abusive sexual contact, rape of a child, sexual assault of a child, sexual abuse of a child, forcible sodomy and attempts to commit these offenses.

### **AIR FORCE EVALUATION**

The AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request for an upgrade to his discharge based on his mental health contention. The applicant did not provide any clarifying information regarding how his mental health condition caused his misconduct, court-martial conviction, and BCD. He reported he was diagnosed with PTSD during service, but his service treatment records do not substantiate this claim. He received brief mental health counseling while he was incarcerated and was prescribed medication as he contended but was never diagnosed with PTSD during service. There were no reports of any trauma or traumatic experiences related to his deployment or military duties documented in his service treatment records. The applicant was not diagnosed with PTSD until several years post discharge. It appeared through his DVA treatment records he had a delayed onset of this condition, which is not uncommon. Only one of his mental health treatment notes stated his stressors were possibly related to his incarceration. This explanation would be reasonable considering many people in similar situations would experience similar reactions. He was given diagnoses of adjustment disorder with anxiety, anxiety disorder not otherwise specified (NOS), and adjustment disorder with anxiety and depressed mood during service presumably because of this experience. Regardless of the existence or absence of a PTSD diagnosis during service, there was no evidence in his objective military records or personal testimony his mental health condition had a direct impact on his behaviors and functioning resulting with his discharge. An explanation would not excuse or mitigate his discharge because he had pled guilty and was convicted at court-martial for distributing marijuana on several occasions and at different locations. These behaviors could be considered as premeditated behaviors as these activities involved coordination and planning. There was no evidence he had any intellectual or cognitive impairments or was in emotional distress at the time of his misconduct and so he knew the difference between right and wrong. His behaviors and misconduct do not appear to be impulsive or caused by his mental health condition. There was no evidence his mental health condition caused his BCD, therefore, the Psychological Advisor finds no error or injustice with his discharge.

The Psychological Advisor opines liberal consideration is not required to be applied to the applicant's petition. His misconduct and behaviors were found to be premeditated based on the policy's guidance. Should the Board elect to apply liberal consideration to the applicant's request due to his contention of a mental health condition during service, the following are responses based on information presented in the records to the four questions in the policy:

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1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?  
The applicant contends he was diagnosed with PTSD and was prescribed Prozac during the last one and a half year on active duty. He provided no explanations of how his mental health condition may excuse or mitigate his discharge.
2. Did the condition exist or experience occur during military service?  
There is evidence the applicant received brief mental health treatment and was prescribed Prozac by his PCM during his confinement in service. He was however, never diagnosed with PTSD but was given diagnoses of adjustment disorder with anxiety, anxiety disorder NOS, and adjustment disorder with anxiety and depressed mood most likely caused by his incarceration.
3. Does the condition or experience excuse or mitigate the discharge?  
There is no evidence the applicant's mental health condition had a direct impact to his behaviors and misconduct resulting with his discharge and would not excuse or mitigate his discharge. His behaviors of distributing an illicit drug on multiple occasions are considered to be premeditated behaviors.
4. Does the condition or experience outweigh the discharge?  
Since there was no evidence his mental health condition may excuse or mitigate his discharge, it also does not outweigh his discharge

The complete advisory opinion is at Exhibit C.

**APPLICANT'S REVIEW OF EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 14 Jun 22 for comment (Exhibit D), but has received no response.

**FINDINGS AND CONCLUSION**

1. The application is not timely. Given the requirement for passage of time, all clemency requests are technically untimely. However, it would be illogical to deny a clemency application as untimely, since the Board typically looks for over 15 years of good conduct post-service. Therefore, the Board declines to assert the three-year limitations period established by 10 U.S.C. § 1552(b).
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board concludes the applicant is not the victim of an injustice. The Board finds no evidence that the sentence of the military court was improper or that it exceeded the limitations set forth in the Uniform Code of Military Justice. The Board also considered the passage of time, the overall quality of the applicant's service, the seriousness of the offenses committed. The Board concurs with the rationale of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness; however, given the evidence presented, the Board finds no basis to do so. Finally, giving the applicant's misconduct and behaviors were found to be premeditated, the Board is satisfied that the

application of liberal consideration does not warrant relief. Therefore, the Board recommends against correcting the applicant's record.

**RECOMMENDATION**

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

**CERTIFICATION**

The following quorum of the Board, as defined in Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.5, considered Docket Number BC-2021-03464 in Executive Session on 24 Aug 22:

 Panel Chair  
 Panel Member  
 Panel Member

All members voted against correcting the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 7 Oct 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory opinion, AFRBA Psychological Advisor, dated 21 Apr 22.
- Exhibit D: Notification of advisory, SAF/MRBC to applicant, dated 14 Jun 22.
- Exhibit E: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 15 Jun 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

5/15/2023

  
Board Operations Manager, AFBCMR  
Signed by: USAF